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# HABEAS CORPUS PROCEDURE

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Moderization and clarification of procedure dominated the 1963 habeas corpus decisions in Colorado. By far the most important of these decisions was *Stilley v. Tinsley;*[1] the others being barely worthy of comment.[2]

The *Stilley* case, brought up on writ of error, sought a reversal of a decision by the Denver District Court which, on final hearing of the petition for writ of habeas corpus, found that Stilley's original sentence was void, dismissed the petition, and then proceeded to pronounce proper sentence *nunc pro tunc* from the original date of sentence.[3] The supreme court held that the only question properly before the trial court was the present authority of Tinsley to keep Stilley confined in the penitentiary. Because the original judgment was void, the only authority to confine the petitioner was the equally void mittimus. The conclusion stated in the opinion is that the

> trial court did not 'dispose of the prisoner as the case may require,' but went into other matters not properly before the court and erroneously decided the one and only issue that was properly before it.
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> The trial court correctly determined that at the time of his pronouncement, Tinsley had no authority to restrain Stilley, and that the mittimus, Tinsley's authority, was void. Having so decided, the trial judge had only one remaining duty to perform in the case then before him —

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1 385 P.2d 677 (Colo. 1963).

2 These cases held:

(a) Specht v. Tinsley, 385 P.2d 423 (Colo. 1963), outlines the three situations in which habeas corpus is available to one committed in a criminal proceeding; these are where the trial court (1) has no jurisdiction over the person, (2) has no jurisdiction over the subject matter of the offense, and (3) renders a void judgment and sentence, reaffirms that the writ cannot be substituted for a writ of error, holds that although one may be improperly confined in a criminal case, he is not *ipso facto* entitled to discharge, bail or other relief, and holds that the procedural issue of being sentenced under the wrong statute cannot be raised in a habeas corpus proceeding. The trial court is admonished for not following proper procedure as required by C.R.S. '53 § 65-1-1, in that the trial court issued a show cause order to Tinsley instead of forthwith granting or denying the writ.

(b) In re Pigg's Petition, 384 P.2d 267 (Colo. 1963), granted a request to proceed in forma pauperis to prosecute a writ of error to a judgment denying a writ of habeas corpus. The supreme court refused to assign counsel, indicating that the trial court is the proper forum for that purpose. Review is available if the trial court denies the appointment.

(c) In Kostal v. Tinsley, 381 P.2d 43 (Colo. 1963), the court decided that a prisoner who was placed in solitary confinement for attempted escape and on the suspicion of the senior captain of guards at the state penitentiary, and who during those periods was denied access to his typewriter and legal materials, had not alleged any act, omission or event which would entitle him to a discharge on writ of habeas corpus. This was especially true since the petitioner had been granted additional time to file his legal papers.

(d) Although the petition for writ of habeas corpus was improperly filed in the criminal action in Buhler v. People, 377 P.2d 748 (Colo. 1963), the court reversed a dismissal of the writ on the ground that the warrant for extradition to Illinois was void because it did not charge an offense under the Illinois statutes. The members of the bench and bar were reminded that habeas corpus is a civil proceeding and the writ should be filed in a separate action, naming as respondent the person detaining the petitioner. This case is cited in Stilley *supra,* for this proposition.

3 The pertinent part of the district court's order is found in 385 P.2d at 679. Stilley's petition was filed in the trial court alleging that Tinsley, warden of the state penitentiary, was illegally confining him as a parole violator. He claimed that he was convicted of burglary in the Denver District Court and, on November 24, 1954, was sentenced to the penitentiary for a period of one to ten years and that mittimus issued in conformity with the sentence. He alleged further that at the time of sentence he was under twenty-one years of age and under C.R.S. '53 § 39-10-1 could be sentenced only to the state reformatory and that therefore his sentence to the penitentiary and the mittimus thereunder were void, thus making his present confinement for parole violation equally void.

order Stilley released from the custody and restraint of Tinsley.[4]

By so deciding, the court reaffirmed its decisions in *Rivera v. People*[5] and *Barrett v. People*[6] that "A judgment and sentence to the penitentiary for any term, when the law requires a reformatory confinement, is a void judgment and habeas corpus is a proper remedy to afford relief."[7] This, in effect, overruled that part of *Hart v. Best*[8] which held:

> There is a distinction between a void and an erroneous judgment, and the general rule is that where the court has jurisdiction of the subject matter and of the person, its judgment in the case will not be void, although it may be erroneous, and that in a collateral proceeding the validity of the judgment cannot be called in question.[9]

Having recorded its opinion in relation to Stilley's appeal, the court proceeded, "by way of dictum,"[10] to set forth its current policy on habeas corpus procedure. First, it stated that the constitutional and statutory rules concerning habeas corpus are mandatory and must be obeyed.[11] For example, the trial court's erroneous dismissal of Stilley's petition left Stilley and Tinsley in their original position, that is, prisoner and jailer. Any action by Tinsley,

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4 385 P.2d at 681.

5 128 Colo. 549, 265 P.2d 226 (1953).

6 136 Colo. 144, 315 P.2d 192 (1957).

7 128 Colo. at 555, 265 P.2d at 229. See also Latham v. People, 136 Colo. 252, 317 P.2d 894 (1957), in which the petitioner was sentenced under the habitual criminal statute (C.R.S. '53 § 39-13-1 et seq.). In so sentencing him, the trial court relied on two prior felony convictions (sentences to the penitentiary). At the time of both prior convictions petitioner was under 21 and should have been sentenced to the reformatory. Since both prior convictions were "erroneous and void" under the rational of the Barrett case, the supreme court held the sentence under the habitual criminal statute was likewise void and remanded the cause for resentencing in accordance with the petitioner's motion. The use by the court of the phrase "erroneous and void" was unfortunate in light of decisions holding that habeas corpus will not lie to obtain a discharge from an erroneous sentence (see, e.g., Martin v. District Court, 37 Colo. 110, 86 Pac. 82 (1906), but here the sentences were so clearly void that no harm was done, see generally 25 Am. Jur. *Habeas Corpus* § 27 (1940).

The problem of void sentences under the requirement of C.R.S. '53 § 39-10-1 was rectified by an amendment to that statute in 1958. See C.R.S. § 39-10-1 (Perm. Supp. 1960).

8 119 Colo. 569, 205 P.2d 787 (1949).

9 *Id.* at 568, 205 P.2d at 793. The court expressly disavows this language in dictum in the Stilley opinion. See 385 P.2d at 687.

10 385 P.2d at 681. The court said:

> This opinion might well end here. However, in view of lack of consistency in prior decisions of this court and an apparent lack of clear and definite pronouncements of this court as to proper procedures to be followed in frequently recurring situations such as we have here and because of the great public concern in such problems, we, contrary to our usual procedures and by way of dictum, express our present views on several matters that are or have been the subject of much confusion.

11 These provisions will be found in Colo. Const. art. II § 21; Colo. Const. art. VI, §§ 3 and 11; C.R.S. '53 §§ 65-1-1 et. seq. (1953).

other than the retention of Stilley in custody, *e.g.*, releasing him to the custody of another, would, the opinion states, be beyond Tinsley's power and could result in a "heap of trouble."[12]

Next, the court reviewed its decisions in *Smith v. Best*[13] and *Barrett v. People, supra.* After distinguishing the two cases,[14] the supreme court abolished its former practice of allowing a petition for a writ of habeas corpus, when dismissed, to be treated as a petition for the entry of a proper judgment.[15] This reappraisal was no doubt fostered by the adoption of the Rules of Criminal Procedure in 1961; the remedy alternatively allowed in the *Smith* case now being covered by rule thirty-five.[16]

The court did not disavow all of the *Barrett* case. It specifically subscribed to language therein which held that (1) habeas corpus is in the nature of a civil proceeding, (2) habeas corpus is a proper remedy for relief from a void judgment, and (3) it is procedurally improper to file the petition in the criminal case, because (4) the proper respondent is the person in whose custody the petitioner is detained, not the People of Colorado (the complainant in the criminal action).[17]

Up to this point the *Stilley* opinion is clear, well-reasoned, and illuminating. It proceeds to dissolve temporarily in a morass of confusion, not all of the court's own making. This began with a "revisitation" of *Hart v. Best, supra.* The court: (1) disagreed with the holding in *Hart* that a sentence beyond the jurisdiction of the

12 385 P.2d at 681.

13 115 Colo. 494, 176 P.2d 686 (1946).

14 In Smith v. Best, *supra*, the petitioner sought a discharge on the ground that no minimum sentence had been fixed as required by law. The court, holding that this was merely an erroneous and not a void sentence, affirmed the trial court's dismissal of the petition, but said that the petitioner might, *at his election*, have the petition treated as one for entry of proper judgment. (Emphasis supplied.)

In Barrett, the petitioner appealed the discharge of his writ by the trial court. He had been sentenced to the penitentiary following a burglary conviction, although he was only 19. The sentencing court had acted on the basis of an alleged prior felony conviction. The supreme court found that under the statute Barrett had not committed a felony since the definition, as interpreted, requires a sentence to the penitentiary and Barrett, after his first conviction, had not been sentenced but only placed on probation. On these facts the penitentiary sentence was void under the Rivera opinion.

Instead of ordering Barrett's discharge, however, the court treated the petition for habeas corpus as one for the entry of proper judgment, purportedly following the Smith case. This latter opinion, of course, merely made the choice discretionary with the petitioner in situations where his petition for habeas corpus would not lie to obtain a discharge from an erroneous sentence. But in Barrett, the choice was forced on the prisoner in violation of his right to a discharge from the void sentence.

15 The court said, at page 682 of 385 P.2d: "For the future guidance of courts and counsel, we hold that it is mandatory that petitions for habeas corpus be treated as such, and that writs be issued, denied, discharged or made permanent as the pleadings and proofs may dictate."

16 Colo. R. Crim. P. 35. The rule provides, in pertinent part:

(a) Correction of Illegal Sentence

The court may correct an illegal sentence at any time. It may, on motion or of its own motion, correct a sentence not conforming to the applicable statutes, either by amending the sentence and record thereof, or, when circumstances require, by vacating the sentence previously imposed and resentencing the defendant.

(b) Post Conviction Remedy for Prisoner in Custody

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the constitution or laws of Colorado or of the United States, or that the court imposing the sentence was without jurisdiction to do so, or that the sentence was in excess of the maximum sentence authorized by law, or that the statute for the violation of which the sentence was imposed is unconstitutional or was repealed before the prisoner contravened its provisions, may file a motion at any time in the court which imposed such senence to vacate, set aside or correct it. . . . If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal, or that the statute upon which the sentence was based is unconstitutional or was repealed before the prisoner contravened its provisions, or that there was a violation of the prisoner's constitutional rights of a sort not effectively subject to review on writ of error either because the violation itself operated to prevent review or because the violation through no fault of the prisoner did not appear upon the record so as to be subject to review, the court shall vacate and set aside the judgment, and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. . . .

17 385 P.2d at 682, 683.

court was merely erroneous and not void,[18] (2) found that *Hart* and *Martin v. District Court*,[19] on which it relied, are not at all similar,[20] (3) expressed approval that "It was incumbent upon the defendant to exhaust his legal remedies before asking the indulgence of the court in the issuance of a writ of habeas corpus,"[21] and (4) found that the case had a "happy and just ending in spite of the many objectionable features outlined above."[22]

One vital error in the *Hart* case, on which the court later commented, was completely omitted at this point in the opinion. Summarizing its opinion in *Hart*, the court said: "[W]e hold that the District Court of Fremont county [where the petition was filed], being a court of coordinate jurisdiction with the District Court of Prowers county [where the original judgment was rendered], lacked jurisdiction by habeas corpus to alter, modify, or nullify the judgment and sentence of the District Court of Prowers county. . . ."[23] This is clearly contra to constitutional and statutory provisions.[24]

The opinion sank deeper into the mire as the court sought to interpret a series of 1949 cases, all of which were an outgrowth of *People v. Lindsay*.[25] In that decision it was held, in effect, that specific intent must be proven as part of the case against one charged with the crime of confidence game.[26] A deluge of petitions

18 This had, in effect, already been done. See footnotes 8 and 9, *supra*, and related text.

19 37 Colo. 110, 86 Pac 82 (1906). See footnote 7, *supra*.

20 In light of its recent decisions, e.g., Rivera v. People, note 5, *supra*, the court is correct in distinguishing Martin, in which a sentence of 12 to 14 years in the penitentiary was held erroneous and not void, from Hart, in which the defendant was sentenced to the penitentiary instead of the county jail.

Disregarded is the fact that when Hart v. Best was decided, Colorado subscribed to the older view in post-conviction cases, that habeas corpus would lie only when the court lacked jurisdiction over the person or the subject matter of the offense. The Martin case, *supra*, is a leading example of this. See also Scott, Post-Conviction Remedies in Colorado Criminal Cases, 31 Rocky Mt. L. Rev. 249 (1959); Habeas Corpus in Colorado for the Convicted Criminal, 30 Rocky Mt. L. Rev. 145 (1958). See generally Anno. 76, A.L.R. 468 (1932); 25 Am. Jur. *Habeas Corpus*, § 27 (1940).

21 385 P.2d at 684. See 119 Colo. at 582, 205 P.2d at 794.

22 385 P.2d at 685. A supplemental record filed in the supreme court after the case had been docketed there revealed that the defendant was charged with causing two deaths by motor vehicle while under the influence of alcohol and that was the charge on which the jury found him guilty. This latter charge is a felony, thus validating the penitentiary sentence.

23 119 Colo. at 584, 205 P.2d at 795.

24 Colo. Const. art. VI, § 11. "The district courts shall have original jurisdiction of all cases both at law and in equity, . . ."

C.R.S. '53 § 65-1-1. "If any person shall be committed or detained for any criminal or supposed criminal matter, it shall be lawful for him to apply to the supreme or district courts, in term time, or any judge thereof in vacation, for a writ of habeas corpus, . . ."

25 119 Colo. 248, 202 P.2d 251 (1949).

26 The People appealed a directed verdict of not guilty in the trial court. The supreme court quoted People v. Snyder, 327 Ill. 402, 158 N.E. 677: "Where the property is obtained by unlawful means other than by fraudulently obtaining the confidence so obtained, a conviction for the confidence game cannot stand." The Colorado court continued: "It is apparent that the use of the word 'false' or 'bogus' check in the 'confidence game' statute means something more than the mere making and passing of the check. The manner of passing it and other circumstances connected with the obtaining of money thereon necessarily must enter into the occasion before it may be considered a part of a confidence game." The trial court's decision was affirmed.

for writs of habeas corpus followed, claiming that the petitioners' confidence game convictions were void under the supreme court's ruling. The first of these to reach the supreme court (they are discussed in chonological order) was *People ex rel. Metzger v. District Court* (first Metzger case).[27] The court held, in that case, that with no record of the trial court before it on writ of prohibition brought by the People, there was a presumption that the trial court proceedings were proper and the judgment was free from infirmity. The trial court no longer had jurisdiction, after the expiration of the term of court at which judgment was pronounced, to review the facts and the writ of prohibition was made permanent. In dictum, the opinion explained that the *Lindsay* case did not change the law, "but merely approved the defense set up in the case, which defense may be available in many cases 'short' checks are involved."[28]

The second case, *Best v. People ex rel. Florom*,[29] was decided in the trial court before the first *Metzger* opinion, *supra*, was handed down. On a petition for a writ of habeas corpus, the trial court set aside the original judgment and sentence and resentenced Florom *nunc pro tunc* to six months in county jail. On writ of error brought by the People the supreme court judicially noticed the lapse of three terms of court and reversed, relying on the first *Metzger* case. In doing so, it was held that except for correction of formal errors and relief from a "void and voidable" judgment, the trial court no longer had jurisdiction. The opinion also cited *Hart v. Best, supra*, for the proposition that the proper remedy would have been a writ of error from the original judgment.

Case three was *People ex rel. Metzger v. District Court* (second Metzger case).[30] This involved a writ of prohibition sought by the attorney general to prevent the district court from acting on a petition for writ of habeas corpus. The supreme court found that the allegations in the petition were sufficient to establish the petitioner's right to a hearing and prohibition was denied.

The *Stilley* opinion approves language in the second *Metzger* case and disavows contrary holdings in *Hart*, the first *Metzger* case and *Best*. This result is proper in view of the more recent decisions cited by the court,[31] but, contra to what the court said, the reconciliation of the two *Metzger* cases is not an "impossible task."[32]

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27 119 Colo. 451, 208 P.2d 79 (1949).
28 *Id.* at 456, 208 P.2d at 81.
29 121 Colo. 100, 212 P.2d 1007 (1949).
30 121 Colo. 141, 215 P.2d 327 (1949).
31 McGrath v. Tinsley, 138 Colo. 18, 328 P.2d 579 (1958); Ferrell v. District Court, 135 Colo. 329, 311 P.2d 410 (1957); Freeman v. Tinsley, 135 Colo. 62, 308 P.2d 220 (1957), *cert. den.*, 355 U.S. 843 (1958); Rivera v. People, 128 Colo. 549, 255 P.2d 226 (1953).
32 In the *first* Metzger case a petition to vacate sentence was filed in the trial court based on the Lindsay opinion. The trial court ordered the petitioner brought to Denver pending further order of court, whereupon the attorney general brought a prohibition action in the supreme court. In making the write of prohibition permanent, the supreme court pointed out that there was nothing void about the sentence of the defendant following his confidence game conviction and if there had been error in his conviction, writ of error was the proper remedy.

On the other hand, in the *second* Metzger case the proceedings took a different form. The petitioner first filed a petition and motion for vacating sentence in the nature of a writ of Coram Nobis. On hearing, the trial court determined that under the Lindsay ruling the evidence did not support a confidence game conviction and ordered the petitioner's former plea of guilty set aside, vacated sentence and ordered the petitioner discharged. Subsequently the district attorney filed a nolle prosequi. While the discharge order was in effect, the petitioner was rearrested and returned to the penitentiary. It was from this latter confinement that he sought a writ of habeus corpus. The attorney general's prohibition action was begun to prevent the district court from holding a hearing on the habeas corpus application. Clearly, this would be a proper habeas corpus case, and the court so determined by refusing the prohibition. Just as clearly these facts distinguish the two Metzger cases.

Nor is *Best* inconsistent with the second *Metzger* case.[33] Thus the only true inconsistency is that between *Hart v. Best* and the second *Metzger* case, which the court correctly pinpoints and rectifies.

The opinion emerged at this point from its needless confusion and proceeded to clarify the position of the district and county courts in habeas corpus proceedings. The statutory provision conferring jurisdiction on the district courts was cited with approval[34] and the court said:

> We disavow the *obiter dictum* in Rivera [sic; the court meant *Gallegos v. Tinsley,* 139 Colo. 157, 337 P.2d 386 (1959)] and hold that one seeking habeas corpus may select his forum. He may seek the aid of the supreme court or any district court at any time. He may even seek the aid of any county court at the times allowed and as provided by CRS '53, 65-1-20.[35]

Following this reasoning the court indicated that the statutory regulations set up by the legislature must be carefully followed and said:

> To impose any other or additional condition on one seeking the writ would be doing exactly what the Constitution and the Legislature have said shall not be done. To impose conditions on issuance of the writ, such as exhausting other available remedies in situations such as we have here, is *pro tanto* a suspension of the writ. We accept CRS '53, Chapter 65, at its face value and so construe it as to make applications for the writ available in the forum most convenient for the applicant, and recognize no restrictions attempted to be imposed upon the right of one to choose any forum provided by statute for asserting his rights and the protection afforded by the Constitution and statutes.
>
> We are not unmindful of Rule 35 of Colorado Rules of Criminal Procedure, adopted and effective November 1, 1961 (after the judgment was entered in this case), and observe that that rule in no way seeks to impose any conditions on the issuance of habeas corpus writs — it only affords a remedy for those seeking a proper sentence, a remedy which the prisoner may seek or not seek at his election.[36]

Just what are "situations such as we have here" is not clarified by the court. This raises the question whether or not the opinion stands for the general proposition that one seeking habeas corpus need no longer exhaust his legal remedies.[37] If not, the opinion at least holds that a motion under Rule 35 of Colo. R. Crim. P. is not a condition precedent to petitioning for a writ of habeas corpus.

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33 The facts in Best are quite similar to those in the *first* Metzger case. The trial court vacated the original sentence and pronounced a new one. The People appealed and the court decided the case as outlined in the text. It is distinguishable from the *second* Metzger case on this basis.

It is not intended by the text and footnote material to merely pick at the opinion of the Supreme Court of Colorado. The purpose in pointing out the harmless misconceptions in the Stilley opinion is to prevent the same thing from happening in a more vital context.

34 See note 24, *supra.*

35 385 P.2d at 688.

36 *Id.* at 688, 689.

37 This would be against the weight of prior Colorado decisions. There is a clear statement in Hart v. Best, quoted in the text, *supra,* at footnote 21, to the effect that legal remedies must be exhausted before habeas corpus will lie. See also Lewis v. Tinsley, 138 Colo. 117, 330 P.2d 532 (1958); Ex Parte Arakawa, 78 Colo. 193, 240 Pac. 940 (1925); Ex Parte Rainbolt, 64 Colo. 581, 172 Pac. 1068 (1918). But see Ex Parte Miller, 66 Colo. 261, 180 Pac. 749 (1919).

Professor Austin Scott, Jr., in commenting on the overlapping of Rule 35 and habeas corpus, has taken the opposite view.[38] Professor Scott's view seems to be the sounder, its theory being to give the trial court a chance to correct its own errors before beginning a collateral attack through habeas corpus.

An outline of habeas corpus procedure in Colorado has been badly needed for some time. Despite the inherent defects of providing this outline in a dictum opinion,[39] it is a giant step forward in this area of the criminal practice in Colorado. It is suggested that the supreme court's next step be to provide for the codification of a set of rules governing habeas corpus. This will provide the lasting consistency, subject to periodic revision, required in habeas corpus proceedings.

38 34 Rocky Mt. L. Rev. 63, 66, 67 (1961). See footnotes 4-6 and related text. See generally 25 Am. Jur. *Habeas Corpus* § 19 (1940).

39 The most important defect is that the doctrine of stare decisis does not operate on dictum opinions.